JD-70-06
Orange, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DISH NETWORK SERVICES, LLC,

and Case 22-CA-27104

DISTRICT LODGE 15, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO.

Benjamin W. Green, Esq.
of Newark, New Jersey, for the General Counsel

George Basara, Esq.
of Pittsburgh, Pennsylvania, for the Respondent

DECISION

STATEMENT OF THE CASE

DAVID I. GOLDMAN, Administrative Law Judge. The complaint in this case was based on charges filed September 23, 2005[1] by District Lodge 15, International Association of Machinists & Aerospace Workers, AFL–CIO (the Union). The Union filed a first amended charge on October 12, a second amended charge November 15, a third amended charge on December 28, and a fourth amended charge on December 29. The Board's General Counsel issued the complaint in this matter on February 28, 2006, against Dish Network Services, LLC (DNS). The case was tried before me in Newark, New Jersey, on May 31, 2006. The parties filed briefs on June 30, 2006. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. Jurisdiction

Respondent, a corporation, sells, installs, and maintains satellite television systems in homes and businesses from facilities around the country, including a facility in Orange, New Jersey. At its Orange, New Jersey facility Respondent annually derives gross revenues in excess of $100,000 and during the preceding twelve months purchased and received goods and materials valued in excess of $5000 directly from points located outside the State of New Jersey. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent further admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act (the Act).

[1] All dates are from 2005 unless otherwise indicated.

II. Unfair Labor Practices

A. Background

Respondent employs approximately 30 Field Service Specialist technicians at its Orange, New Jersey facility. Field Service Specialist (FSS) technicians install and maintain television satellite systems in customers' homes.

There are three FSS pay grades (FSS1, FSS2, and FSS3) and base pay increases $1 per hour in each grade. Technicians' pay grades are based on experience but annual raises traditionally implemented in March of each year have a merit-based component so that individual employees in the same FSS pay grade do not necessarily have the same rate of pay. For some years there has been discussion of creating an FSS4 pay grade but to date that has not happened.

The standard weekly work shift for FSS technicians is four 10-hour days. Shifts run from 7 a.m. to 5:30 p.m., and employees work Sunday to Wednesday or Wednesday to Saturday. Overtime is paid for work beyond 40 hours in any work week. Technicians earn overtime pay in three different ways. Typically, each morning a technician receives a list of four to six jobs to be completed during the workday. DSN prefers employees to be finished with these jobs by shift's end, but technicians are expected to complete their daily jobs even if it is necessary to work beyond 5:30 p.m. Employees often require a limited amount of overtime to complete their standard daily assignments. More extensive overtime can be earned if an employee works additional days beyond his 4-day workweek, or is sent "out of market" to perform work in regions outside the Orange area. In the latter case, employees usually drive vans to the location, stay in hotels, and work every day they are there. Between travel time, working every day, and the daily per diem paid to employees engaged in "out-of-market work," substantial overtime and expense money can be earned. An out-of-market assignment can last anywhere from 1 week to 2 months and perhaps more. Overtime is essentially mandatory if required to complete standard daily assignments. Although the record is less than clear, working additional workdays appears to be voluntary. Out-of-market work—the most lucrative work for employees—is voluntary and is considered "gravy" work because it enables an employee to earn so much additional income. It is offered to employees as needed by DSN to accomplish varying work loads. Determining the demand for out-of-market work is relatively complicated and requires managers to compare the work levels and percentage of work being done by subcontractors in various regions in order to assess when and where it makes sense to bring technicians out of their home market to work out of market.

DSN regularly offers customer incentive programs designed to increase sales to new customers. The club dish program appears to be the latest. It provides incentives to enlist existing DNS customers to refer new customers to DSN. Both the referring customer and the new customer receive certain discounts and benefits. The club dish program contains an employee incentive component as well. As part of the program, technicians distribute "gift packs" to customers that include club dish cards that can be used by customers in the program. Under the terms of the program technicians receive $20 for each new customer enrolled in the program and in addition, bonus awards in the form of gift cards are awarded to technicians who first acquire a new customer through the program and to technicians who bring in the most new customers through the program. (GC Exh. 2). The club dish program employee incentive provisions were implemented nationwide on September 1, *except* at the Orange facility. The program was never implemented at Orange.

In the summer of 2005, a union organizing campaign culminated in an August 24 Board-conducted representation election for a bargaining unit covering the Orange field service technicians and warehouse employees. The Union was successful in this election and was certified as the unit employees' collective-bargaining representative on September 1. Bargaining for an initial labor agreement was ongoing at the time of the hearing.[2]

b. Complaint Allegations

The Government alleges that during preelection meetings with employees Respondent promised employees that it would create the higher paid FSS4 technician position and would provide a general pay increase if employees did not vote for the Union. General Counsel contends that this conduct violated Section 8(a)(1) of the Act. The complaint attributed these statements to Hugo Guerreiro, then a field service manager at the Orange facility. After testimony, discussed below, counsel for the General Counsel moved to amend the complaint to conform the pleadings to the evidence, specifically to allege that in addition to Guerreiro, DSN regional manager William Savino made the alleged statements.

The complaint further alleges that on August 25, the day after the representation election, Respondent, through Manager Guerreiro, advised employees that because they had voted for union representation they alone among Respondent's employees nationwide (DNS employees approximately 44,000 employees across the country) could not participate in the club dish program. At the same time, Guerreiro allegedly informed employees that they would not be receiving overtime assignments because they had chosen union representation. General Counsel contends that this conduct violated Section 8(a)(1) of the Act.

In addition, the Government alleges that Respondent's decision not to implement the club dish program at the Orange facility, allegedly promised to employees, was in retaliation for the employees' union activities and to discourage such activity, and was violative of Section 8(a)(1) and (3) of the Act.[3]

c. Discussion and Analysis

1. Preelection promises to provide a pay increase and create the FSS4 position if employees did not vote for union representation

As noted above, during the summer of 2005, the Union conducted an organizing drive at DSN's Orange, New Jersey facility. DSN opposed the drive and campaigned against the Union.

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[2]The union-represented bargaining unit consisted of:

> All full-time and regular part-time technicians and warehouse employees employed by the Employer at its Orange, New Jersey facility, but excluding clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

[3]I note that at the hearing I granted counsel for the General Counsel's unopposed motions to amend the complaint to remove reference to Jose Ortiz in paragraph 6, to withdraw paragraph 10 in its entirety, and to replace all references in the complaint to the "Gift Card Incentive Program" with the "Club Dish Program." (Tr. 6, 68–69). Similarly, Respondent's unopposed motion to strike Lino Machado's name from paragraph 12 of the complaint was granted. (Tr. 105–106).

The campaign against unionization included meetings with employees during working hours conducted by DSN supervisors and/or management.

FSS technician Amare Saleem, who served as the Union's observer during at the representation election, testified that the union campaign lasted from June until the election on August 24. Saleem was on "maternity" leave for about 3 weeks beginning in early August but was back at work at the time of the election. Saleem attended approximately four meetings conducted by DSN that were part of DSN's campaign opposing the Union. Saleem heard from other employees that there were many more such meetings but he was not present for them.

The meetings Saleem attended were conducted by William Savino. Savino is DSN's regional director for the northeast United States. He is responsible for 28 DSN facilities in 10 states from Maine to West Virginia. Also attending the meetings were Hugo Guerreiro and a number of other managers. All the employees working on the shift were present. Saleem claimed that at the meetings pay grades were discussed and according to Saleem, Savino said that "if we didn't vote the Union in he would be more flexible. He can give us—he can implement an FSS4 pay raise, which would entail a dollar, and a market increase which would entail a dollar." On cross-examination Saleem asserted that these meetings, led by Savino, occurred "every single day" in the month before the election. At least, this is what he heard from other employees, as Saleem was on leave for much of the period before the election. In his direct testimony, Saleem did not mention (as alleged in the complaint) Guerreiro making any of these statements, but when led on redirect he added that "Hugo said it [too] but it mainly was by Bill Savino."

Savino disputed some of Saleem's testimony. He testified that as part of DSN's campaign against the Union and prior to the election he met with employees at the Orange facility three or four times. He denied meeting with employees "every day" in the period before the election. Savino admitted that the topic of an FSS4 position came up in these meetings because, he testified, "We've been talking about a field service 4 positions since I've been with this company at least four years now. And we're still talking about it. It's still in the process of being developed." In his testimony, Savino added, "my understanding is that the company definitely wants to create this position. I believe that it will happen, that's why I had commented." Savino denied promising anyone that it would happen. As to discussions with employees during the preelection time period regarding wage increases, Savino emphatically denied Saleem's charge, contending essentially that it would make no sense to have such conversations since companywide wage increases are determined in February every year and were not on the horizon in July or August. Guerreiro also denied making these comments.

The resolution of these allegations rests on credibility determinations. I found Saleem to be an honest witness and I was impressed by his demeanor. But I cannot ignore the significant confusion evinced on key issues. The reason the complaint ascribed these comments to Guerreiro is because, as Respondent's counsel pointed out in impeaching Saleem, that is the individual to whom Saleem attributed the comments in his pretrial affidavit provided to the Board's Regional office. Saleem's affidavit did not attribute any of these statements to Savino, only to Guerreiro. In his affidavit he did not even mention Savino's presence at any of the pre-election meetings. Yet, as discussed above, at trial Saleem attributed the comments to Savino, and would not have mentioned Guerreiro at all had he not been led to do so on redirect. Even then it was a half-hearted accusation regarding Guerreiro. According to Saleem's testimony, Savino was the main culprit. It undercuts his testimony that he attributed these allegations to one person in his affidavit and another in his testimony at trial. No explanation for this inconsistency was offered. To this I add that Saleem's claim that Savino held meetings daily, something he suggests he heard from other employees, seems unlikely. It is not just that

Savino denied it, but given his multistate responsibilities for 28 facilities, it seems implausible. I recognize that in opposing the union drive Savino would likely be at Orange more often than usual, but the claim that Savino was there daily I do not believe and it undercuts Saleem's credibility on these issues. Notably, no witness was called to corroborate this claim and if Savino was present at the facility every day in the month before the election someone should have been able to corroborate such unusual ubiquity. On the other hand, I found Savino to be a credible witness. I thought his demeanor was equal to that of Saleem's and without the problems inherent in Saleem's testimony.[4] There was some vagueness in some of Savino's answers, for instance he never specifically denied Saleem's claim that he tied the Union to the creation of the FSS4 position, he just said he never promised the FSS4 position. There was also some tendency to fall back on his lack of authority to make the job and wage changes he was accused of saying would be made, which, I agree with General Counsel, is not the same thing. Guerreiro was less impressive as a witness, as I discuss below, but given the fact that Saleem seem to have added him to his testimony on these issues as almost an afterthought, his less than compelling denials are sufficient as to these allegations. Credibility determinations are often, and here, relative endeavors. Given the problems in Saleem's testimony outlined above, I credit Savino and Guerreiro's testimony on these issues and I find that General Counsel has failed to prove its case that, explicitly or implicitly, a pay adjustment or the creation of the FSS-4 position was linked to support or opposition to the Union. I recommend dismissal of these allegations.[5]

2. Postelection comments regarding participation in the club dish program and receipt of overtime assignments

Saleem testified that the day after the election, August 25, Guerreiro held a meeting with all shift employees. At the meeting Guerreiro informed employees that DSN "would be implementing a dish club promotion, and that we weren't a part of it. And I asked well, you know, why weren't we a part of it? Then he said because you guys voted the Union in." At the meeting, there was literature relating to the incentive program on a table. Saleem did not read it carefully but testified that it involved technicians receiving $20 for every new customer connected under the program. Saleem told Guerreiro, "if we're not going to be part of the program we're having, why tell us? Because it seems as though you're' . . . just poking at us."

Previously, Guerreiro had told Saleem that during the union campaign there would not be overtime opportunities available. Saleem understood this to mean opportunities for out-of-market work and opportunities for coming in and working during a day regularly scheduled off, which provided opportunities for accumulation of significant overtime pay (as opposed to an extra hour or two of overtime added to a regularly scheduled day). According to Saleem's uncontradicted testimony, opportunities for these types of overtime had significantly declined or disappeared during the months before the union election. At the August 25 meeting, Saleem told Guerreiro, again referencing out of market and extra day opportunities for work, that

[4]In ruling on Savino's credibility, I decline General Counsel's request that I consider credibility determinations made in a different case involving Respondent. See *Electrical Workers Local 3 (Nixdorf Computers Corp.)*, 252 NLRB 539 fn. 1 (1980) (referring to this practice as "generally inappropriate").

[5]Given my resolution of these allegations, I deny as futile General Counsel's motion to amend the complaint to allege that in addition to Guerreiro, Savino also made the alleged statements. *Foman v. Davis*, 371 U.S. 178 (1962).

"[W]e're still not receiving our overtime . . . . [H]e said well you're not going to. I said well why? He said because you voted the Union in."

Guerreiro testified for Respondent, but his testimony was not convincing. His demeanor suggested to me that he was not being entirely forthright, and he developed a stratagem for avoiding the more difficult questions. On the key questions posed to him, Guerreiro did not answer directly, but consistently fell back on his lack of knowledge or lack of authority to effectuate the statements he was alleged to have made. For instance, he was asked "Did you ever discuss with employees their right to participate in the club dish program after the Union had been voted in?" Guerreiro answered, "The club dish I – it's not up to me as far as who's to get it and who's to do it. I have no say in it." When asked, "Did you ever discuss with employees, during the course of the Union election or afterwards, their right to continue to get out-of-market work?" Guerreiro answered "It's not up to me as far as to who goes out of market. I get an e-mail from my GM saying alright we need two employees, four employees to go out of market out of this office and that office." Guerreiro continued in that vein, but did not answer the question. I have quoted his response to the core postelection allegations attributed to him in the complaint, but a pattern of evasive, sometimes rambling nonresponses was pervasive throughout his testimony. (See e.g., Tr. 109, 115).

Guerreiro's lack of authority to implement the club dish program or to decide when employees will be offered out-of-market work does not answer the question of whether he made these threats. Respondent contends that the fact that Guerreiro did not have authority to decide whether Orange employees participated in the club dish program or whether employees received out-of-market work militates against a finding that he made the statements attributed to him. That is not a particularly compelling argument. Supervisors are capable of threatening employees with the loss of a privilege or benefit that, in reality they do not have the authority to deny. Even assuming, arguendo that employees knew that Guerreiro did not have the authority to make decisions regarding out-of-market work or overtime, they would reasonably assume that his comments reflected Guerreiro's understanding gleaned from more authoritative upper management. Indeed, in the case of denying employees out-of-market work, Saleem testified that Guerreiro attributed the information to Lino Machado, the General Manager at Orange. If employees believed that Machado did not have authority to make such decisions (as he apparently does not) then they would reasonably believe that, like Guerreiro, Machado learned of it from higher up the management ladder.

For purposes of resolving credibility, I note that Guerreiro's resort to answering questions by citing his lack of authority (most charitably interpreted as I "wouldn't" say something like that because I did not have authority to make such decisions), is striking not only for the avoidance of direct denial of making the alleged statements, but for the way it tracks Respondent's argument. It is not surprising or disturbing in any way that a witness would be prepared for his testimony and that this would include an understanding of Respondent's legal position and arguments, but when the witness interposes such arguments in lieu of straightforward responses to critical questions, it undercuts his credibility on the question I must answer: whether he said the things attributed to him.

As noted above, although I did not credit Saleem's testimony with regard to other portions of the complaint, I found him to be an honest witness and I was impressed by his demeanor, particularly in comparison to the problems in Guerreiro's testimony that I have discussed. For all of the above reasons, I credit Saleem over Guerreiro.[6]

[6]The fact that I am willing to credit some but not all of Saleem's testimony is not unusual. It

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Guerreiro's statements to employees that because they had unionized they could not participate in the club dish program and that they would not be receiving assignments involving a particularly lucrative overtime component (out-of-market work) violated Section 8(a)(1) of the Act. Guerreiro's comments are bald statements of reprisal for the employees' selection of union representation, and, even in the case of the yet-to-be implemented club dish program, do not remotely qualify as a purported attempt to explain legal requirements of collective bargaining that encumber a unionized employer. See *Naomi Knitting Plant*, 328 NLRB 1279, 1296 (1999). *Centre Engineering*, 253 NLRB 419, 421 (1980).

In its brief, Respondent renews its motion to dismiss paragraph 14 of the complaint (R. Exh. 1), which is the paragraph alleging that Guerreiro informed employees on August 25 that they would not be receiving overtime assignments because they had chosen union representation. I denied this motion by Respondent at the commencement of the hearing in this case (Tr. 10–13) but invited Respondent to renew the motion in its post-hearing brief after development of the record. Respondent has done so. (R. Br. at 8). Respondent again objects that the allegation in paragraph 14 is not related to an extant charge filed in this case. Respondent points out that the only charge implicating overtime—an 8(a)(3) allegation alleging that overtime was suspended in retaliation for employee support for the Union—was withdrawn prior to issuance of the complaint in this case.

I deny Respondent's renewed motion. The Supreme Court in *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959), held that a charge merely sets in motion the NLRB's inquiry, and a Board complaint is not limited to the specific matters alleged in the charge:

> To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act. . . . Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge.[7]

As the Board explained in *Redd-I, Inc.*, 290 NLRB 1115, 1117 fn. 12 (1988), "It is well settled that it is the complaint, not the charge, that is supposed to give notice to a respondent of the specific claims made against it. . . . The 'charge' has a lesser function. It is not designed to give notice to the person complained of or to limit the hearing or to limit the scope of the final order. It serves in the function of drawing the Board's attention to a cause for economic disturbance." Accordingly, a respondent cannot claim surprise or prejudice based on the relationship of the complaint allegation to the charge. However, in *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), the Board, overruling cases suggesting that "the catchall 'other acts' language preprinted on the charge forms provides a sufficient basis, on its own, to support any and all 8(a)(1) complaint allegations," explained that "[i]n considering the general sufficiency of a

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is long-settled that "[i]t is no reason to refuse to accept everything a witness says, because you don't believe all of it, nothing is more common in all kinds of judicial decisions than to believe some and not all." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 753 (2d Cir. 1950), vacated on other grounds 340 U.S. 474 (1951); *Daikichi Sushi*, 335 NLRB 622, 622 (2001).

[7]360 U.S. at 307–308 (footnote omitted).

charge to support an allegation in the complaint, the Board has generally required that the complaint allegation be related to and arise out of the same situation as the conduct alleged to be unlawful in the underlying charge, although it need not be limited to the specific violations alleged in the charge." Id. Thus, the Board in *Nickles Bakery* held that 8(a)(1) complaint allegations must be "closely related," as discussed in *Redd-I, Inc.*, to the allegations or subject matter set forth as the basis for the underlying charge.[8] The Board in *Nickles Bakery* summarized the "closely related" test articulated in *Redd-I as* a three-factor test for determining whether a complaint allegation satisfies the *Fant Milling* criteria: "First, the Board will look at whether the otherwise untimely allegations involve the same legal theory as the allegations in the pending timely charge. Second, the Board will look at whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as the pending timely charge. Finally, the Board may look at whether a respondent would raise similar defenses to both allegations." *Nickles Bakery*, supra at 928 (footnote omitted); *Precision Concrete*, 337 NLRB 211, 211 (2001).

Applying this test, the Board has repeatedly found that the "closely related" standard is met when the allegations "involve 'acts that are part of the same course of conduct, such as a single campaign against a union,' . . . and acts that are all 'part of an overall plan to resist organization.'" *Ross Stores*, 329 NLRB 573, 573 (1999) (internal citations omitted) and cases cited therein.

In the instant case, the "closely related" test is easily satisfied. The extant charge underlying the allegation involves sec. 8(a)(1) and (3) allegations relating to Respondent's alleged effort before and after the election to dissuade employees from supporting the union and to retaliate against them when they did. The legal theory motivating the allegation that Guerreiro's statement at paragraph 14 violates the Act is that it is one more Section 8(a)(1) violation arising from Respondent's reaction to the union drive and election at the Orange facility. The defense would be anticipated to be, and, in fact, was similar to that raised in response to the other complaint allegations: in this case as in the other unlawful statement Guerreiro was alleged to have made at the same August 25 meeting, the defense was that he did not (or more precisely, would not have) said it. In sum, the charge alleged numerous acts of misconduct by Respondent in the course of and immediately after the Union's organizing drive. "[B]y including the threat [alleged in paragraph 14] in the complaint the General Counsel did not expand a charge upon his own initiative to include allegations that have no reasonable nexus with the charge that put the investigation into motion." *Office Depot*, 330 NLRB 640, 641 (2000). Respondent's argument that no extant charge allegation expressly dealt with comments or actions related to overtime or out-of-market work is not, in light of the applicable standard, of any moment.[9]

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[8]The "closely related" standard applies whether the question is the relation back to a timely filed charge of otherwise time-barred allegations in an amended charge, or whether the question (as here) is whether allegations in a complaint or amended complaint are sufficiently related to those in a charge. *Ross Stores, Inc.*, 329 NLRB 573, 573 fn. 6 (1999), enf. denied 235 F.3d 669 (D.C. Cir. 2001); *Nickles Bakery*, supra at 928; *Office Depot*, 330 NLRB 640, 640 fn. 4 (2000).

[9]On brief DSN makes the additional argument that complaint paragraph 14 is infirm because it alleges a threat that employees will not be receiving overtime assignments, while Guerreiro's threat, as understood by Saleem, applied only to those overtime assignments associated with out-of-market work or work or extra days of work, not overtime earned working late to finish regular daily assignments. DSN's argument boils down to the contention that because Guerreiro was not threatening *all* overtime—but only two of the three methods through which

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3. Postelection refusal to implement the club dish program

On September 1, DSN implemented the club dish program at facilities around the country, but not at Orange. General Counsel alleges that Respondent's discrimination in this regard constituted retaliation against the bargaining unit employees for their selection of union representation in violation of Section 8(a) (1) and (3) of the Act.

Respondent does not disagree that its decision to forgo implementation of the club dish program at Orange was based on the employees' selection of union representation. However, DSN contends that its decision was not prompted by a desire to retaliate against the employees for choosing union representation but was motivated by the desire to avoid running afoul of its new duty to bargain, which attached when the employees voted for union representation on August 24. Respondent contends that it would have been unlawful for it to have implemented the club dish program at Orange as the program's incentives for employees are a mandatory subject of bargaining.

I begin with Respondent's defense. "There is no doubt that an employer's obligation under Section 8(a)(5) of the Act to refrain from making unilateral changes in working conditions commences at the time of an apparent ballot victory for a labor organization rather than at the time of its official certification." *Consolidated Printers, Inc.*, 305 NLRB 1061, 1067 (1992); *Tri-Tech, Services, Inc.*, 340 NLRB 894, 895 (2003).

However, this rule does not apply to changes planned *prior* to the establishment of the bargaining obligation. *Mail Contractors of America, Inc.*, 346 NLRB No. 16, slip op. at 12 (2005) ("If an employer makes a decision to implement a change before becoming obligated to bargain with the union, it does not violate the Act by its later implementation of that change"); *SGS Control Services*, 334 NLRB 858 (2001); *Consolidated Printers, Inc.*, supra at 1067–1068; *Embossing Printers, Inc.*, 268 NLRB 710 (cancellation of bonus after union certified as bargaining representative was lawful because employer's decision to cancel bonus was made before it became obligated to bargain, i.e., before union election), enfd. mem. 742 F.2d 1456 (1984). With regard to changes planned prior to the attachment of a bargaining obligation, "[i]t is well settled that it is the employer's duty to proceed as it would have done had a union not been on the scene." *KDEN Broadcasting Co.*, 225 NLRB 25, 26 (1976); *Eastern Maine Medical Center*, 253 NLRB 224, 242 (1980), enfd. 658 F.2d 1 (1st Cir. 1981). Notably, the ability of the employer to implement the change is not affected by its failure to inform the union or employees before the election of its plans. *Mail Contractors of America*, supra at slip op. at 12; *Consolidated Printers*, supra at 1068.

The club dish program was implemented around the country on September 1. A key question, then, is when DSN made the decision that it was going to implement the program. If after the election, then DSN was required to bargain the implementation with the Union and

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employees earn overtime—the complaint allegation that he told employees they would not be receiving overtime assignments is flawed. I do not believe that DSN's contention is substantial. Guerreiro did threaten the employees' overtime. I do not believe it is required, but were it necessary, I would not hesitate to amend the pleadings to conform to the evidence presented on this issue. The matter was fully and fairly litigated and the evidence supports a violation closely connected to the subject matter of the complaint. *Gallup, Inc.*, 334 NLRB 366 (2001), citing *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

would have violated the duty to bargain had it unilaterally implemented the program at Orange on September 1. However, if DSN determined to implement this program prior to the election, then its new bargaining obligation provides no justification for the refusal to implement the club dish program at Orange.

I note initially that the only employee witness to testify at the hearing, Saleem, offered no testimony that prior to the election Savino (or Guerreiro, or anyone else for that matter) promised employees that the club dish program would be implemented. However, Savino's testimony suggests that employees understood from DSN that the club dish program was, as Savino put it, "in the works." Savino admitted discussing the club dish program with employees prior to the election, as it was a program that he knew DSN was considering implementing. He said that he was careful—in this instance with the potential for a future bargaining obligation particularly careful—to make clear that there was no certainty that DNS would implement the program. Savino characterized his discussions as providing an explanation of what DSN was "looking to do." While denying that he was certain the program was going to be implemented, Savino admitted that prior to the election "[t]he word [was] that it was going to be" implemented. Guerrero also recalled hearing discussion of the club dish, and testified vaguely that he knew the club dish program was "in the works."

Thus, the evidence does not support the conclusion that prior to the election DSN reported to employees that the club dish program definitely was going to be implemented. However, even if DSN kept the prospect of the program's implementation a secret during the preelection period (which it clearly did not), this would not mean that Respondent's postelection bargaining obligation may be relied upon to justify its failure to implement the club dish program at Orange (and only at Orange). As noted above, an employer's ability to implement a postelection change that it decided upon preelection is not affected by its failure to inform the union or employees of its plans. *Mail Contractors of America*, supra, slip op. at 12; C*onsolidated Printers*, supra at 1068. Rather, in evaluating DSN's argument, the important consideration is whether DSN had decided, prior to the election, that it would implement the club dish program.

I believe that the evidence supports the conclusion that DSN had decided before the election that it would be implementing the club dish program. As I have found above, on August 25, the day after the representation election, Guerreiro told the Orange employees, according to the credited testimony of Saleem, that "[DSN] would be implementing a dish club promotion, and that we weren't a part of it. And I asked well, you know, why weren't we a part of it? Then he said because you guys voted the Union in." At the meeting, there was literature relating to the incentive program on a table.

Guerreiro's statement is more than an admission as to Respondent's motive (a matter discussed below). The fact that 1 day after the election Guerreiro could authoritatively state that DSN "would be implementing" the program is compelling circumstantial evidence that the decision to implement the program, whenever it was made, was made sometime before the election.[10] Without this evidence, one would still suspect that a decision by a major corporation to implement a nationwide program covering thousands of employees on September 1 would have been made more than 1 week in advance. But with it, the suspicion is grounded in the testimony of Respondent's agent. Guerreiro's statement was made the day after the election. It

[10]It is not necessary that General Counsel establish the precise date that the decision was made, only that it predated the election. *Consolidated Printers,* 305 NLRB at 1061 fn. 2.

is highly improbable that DSN corporate officials in Colorado made the decision in the (at most) 24 hours after the election, and even more improbable that within that period the decision trickled down the management ranks to Guerreiro, who repeatedly stressed during his testimony his lack of inside knowledge about management intentions. The improbability is buttressed by Savino's admission that, prior to the election, "The word [was] that [the club dish program] was going to be" implemented, and further buttressed by the fact that literature explaining the club dish program was printed and on tables at the Orange facility during the meeting conducted by Guerreiro on August 25. The fact that literature on the program had already been printed and shipped to local facilities leaves little doubt that the decision to go forward with the program had previously been made.

The Board has held that it is appropriate to infer based on all the facts that a decision to implement an employment action was made before an election. *Consolidated Printers, Inc.*, supra at 1061 fn. 2; *Embossing Printers, Inc.*, supra at 710 fn. 2. In view of all the circumstances, I infer from the record and find that that DNS corporate officials made the decision to implement the club dish program at some time before the election. As explained by Guerreiro to Saleem on August 25, immediately after and in response to the election DSN decided *not* to implement club dish at Orange, but, as his comments and the other cited evidence make clear, the decision to implement elsewhere had already been made.[11]

Accordingly, Respondent's new bargaining obligations did not prohibit it from unilaterally implementing the club dish program at Orange after the employees' selection of union representation. Thus, DSN's conduct is not justified by legal obligations. DSN's asserted motive for its conduct is not based on a legitimate legal concern.

We are left with the fact, essentially admitted and announced to employees by Guerreiro, that the program was implemented nationwide, but not at Orange, *because* of the employees' selection of union representation. Without more, and particularly in the absence of a legitimate justification, the Board, with court approval, has found such conduct to be inherently destructive of employee rights, with a consequence of discouraging union activity that is unavoidable, foreseeable and may be presumed to have been intended without further evidence of antiunion motive. *United Aircraft Corp.*, 199 NLRB 658, 662 (1972) ("Respondent contends that there is no proof that its decision to withhold the April 20 increase was unlawfully motivated. None was needed" as "Respondent's conduct was 'inherently destructive of important employee

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[11]For its part, Respondent offers no insight as to when decision to implement the club dish program was made, contending only that it was made by personnel in corporate headquarters, who did not testify, and that Orange facility officials could not be sure of its implementation until the "business rules" e-mail announcing its implementation was circulated throughout the corporation before the September 1 implementation date. Even the date the e-mail was sent is unknown. Obviously, it would have been preferable (from the fact finder's perspective) had General Counsel or Respondent brought those management officials responsible for deciding to implement the club dish program to the hearing to testify. (Savino testified that they were upper level officials working in DSN headquarters in Colorado.) I note that, as discussed above, I generally found Savino to be a credible witness. However, I do not credit his flat denial (Tr. 69) that the decision to implement the club dish program nationwide was not made earlier than its implementation date of September 1. Not only is it entirely implausible, but Savino's further testimony on the subject made clear that Savino was not involved in and did not know when the decision was made that the program was going to be implemented. Indeed, he did not recall when he received the e-mail version of GC Exh. 2 announcing the program and its September 1 implementation date.

rights"), enfd. in relevant part 490 F.2d 1105, 1109–1110 (2d Cir. 1973) ("it is difficult to imagine discriminatory employer conduct more likely to discourage the exercise by employees of their rights to engage in concerted activities than the refusal to put a scheduled [3%] wage increase into effect because the employees, four days before, selected a union as bargaining representative"); *Eastern Maine Medical Center*, 253 NLRB 224, 241–243 (1980) (withholding of wage increase announced 1 day after election is both inherently destructive and specifically found to be unlawfully motivated), enfd. 658 F.2d 1 (1st Cir. 1981); *Harowe Servo Controls, Inc.*, 250 NLRB 958, 959, 1035–1036 (1980) (suspension of wage program, defended by employer on grounds that union must bargain over wages, constitutes unlawful employer reprisal against employees for voting for union representation based on finding that conduct is inherently destructive of employee rights and on specific evidence that suspension was motivated by an effort to punish employees). See also *Illiana Transit Warehouse Corp.*, 323 NLRB 111, 118–120 (1997) (Christmas bonuses unlawfully withheld in retaliation for election of union); *KDEN Broadcasting Co.*, 225 NLRB 25, 26 (1976) (withholding of wage increases that would have been given in absence of vote for union violate Section 8(a)(3)).

Notably, in all of these cases, the employer contended, as DSN does here, that the withheld wage or bonus should be bargained now that a union had been selected. However, the cases do not view that defense as an excuse, but rather, as an admission that the employer's refusal to implement the planned wage or benefit was because of the employee's decision to unionize. *KDEN Broadcasting*, supra at 25–26; *Harowe Servo Controls*, supra at 1035; *Illiana Transit*, supra at 119; *Eastern Maine Medical Center*, supra at 243; *United Aircraft*, supra at 662.

While the inherently destructive nature of discriminatorily withheld benefits does not require specific proof of anti-union motive, in this case, it is unnecessary to presume unlawful intent on Respondent's part, as the evidence demonstrates it. Guerreiro's statement to employees, the day after the election, that they would not be part of the club dish program "because you guys voted the Union in," provides direct evidence of the antiunion motivation for Respondent's decision. As explained in *Eastern Maine Medical Center*, in reference to very similar comments made by the employer one day after the union's election win, "[i]nherent in this explanation was the idea that it was the presence of the Union which made necessary the exclusion of the [bargaining unit employees] from the wage increase." 253 NLRB at 243. Guerreiro's announcement was in response to and timed to counter the election victory. Guerreiro's announcement to employees contained no mention of DSN's collective-bargaining obligations, or need to withhold the benefit to comply with the law, which is the motive for its conduct that Respondent has asserted in litigation.

When Guerreiro announced that the club dish program would not be implemented at Orange "because you guys voted the Union in," Saleem told Guerreiro, "If we're not going to be part of the program we're having, why tell us? Because it seems as though you're' . . . just poking at us." I agree. DSN decided not to implement the program at Orange and made sure that employees knew that the reason was retaliation for their decision to choose union representation. I find that Guerreiro's unvarnished and independently unlawful (see above) statement is probative of Respondent's antiunion motive for its decision to forgo implementation of the club dish program at Orange. By contrast, there is no contemporaneous support for the view, advanced by Respondent at trial, that its conduct was motivated by its (mis)perception of its bargaining obligation. I find that Respondent refused to implement the club dish program at Orange to discourage union activity, conduct violative of Section 8(a)(1) and (3) of the Act.[12]

[12]Conduct violative of Sec. 8(a)(3) would also discourage employees' Sec. 7 rights, and
Continued

CONCLUSIONS OF LAW

1. Respondent is, and has been at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. Charging Party, at all times since September 1, 2005, has been the certified exclusive collective-bargaining representative, within the meaning of Section 9(a) of the Act, of an appropriate unit of Respondent's employees, composed of:

> All full-time and regular part-time technicians and warehouse employees employed by the Employer at its Orange, New Jersey facility, but excluding clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(1) of the Act on or about August 25, 2005, by informing employees at Respondent's Orange, New Jersey facility that they could not participate in the club dish program because they chose union representation.

5. Respondent violated Section 8(a)(1) of the Act on or about August 25, 2005, by, informing employees at Respondent's Orange, New Jersey facility that that they would not be receiving overtime assignments because they chose union representation.

6. Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to implement the club dish program at its Orange, New Jersey facility, on September 1, 2005, as previously scheduled, because the employees chose union representation.

7. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent shall be ordered to implement the club dish program at its Orange, New Jersey facility[13] and to make bargaining unit employees whole for

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therefore is also a derivative violation of Sec. 8(a)(1) of the Act. *Chinese Daily News*, 346 NLRB No. 81, slip op. at 28 (2006). I note that General Counsel does not contend that Respondent's failure to implement the club dish program violated Sec. 8(a)(5) of the Act, and therefore I do not consider that issue.

[13]There is testimony suggesting that the club dish program ended in January 2006, however, this issue was not fully litigated. I make no finding in this regard and leave to a compliance hearing the determination of if and when the program terminated. The order and

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any loss of earnings and other benefits resulting from Respondent's failure and refusal to implement the club dish program at its Orange, New Jersey facility on or about September 1, 2005. The amounts are to be computed on a quarterly basis with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Dish Network Services, LLC, Orange, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

a. Informing employees at its Orange, New Jersey facility that they cannot participate in the club dish program because they chose union representation.

b. Informing employees at its Orange, New Jersey facility that they will not be receiving overtime assignments because they chose union representation.

c. Failing and refusing to implement the club dish program at its Orange, New Jersey facility because employees chose union representation

d. In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

a. Implement the club dish program at its Orange, New Jersey facility, unless it can prove in a compliance proceeding that the program has ended at all DSN locations for reasons unrelated to violations found in this case.

b. Make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of Respondent's failure and refusal to implement the club dish program at its Orange, New Jersey facility, in the manner set forth in the remedy section of the decision.

c. Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place

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notice in this case shall reflect that the requirement that Respondent implement the program at Orange is subject to modification based on proof at compliance by Respondent that the program has ended corporatewide for reasons unrelated to the violations found in this case.

[14]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

designated by the Board or its agents, all records, including an electronic copy of such records if stored in electronic form, necessary to determine if the terms of this Order have been complied with.

d. Within 14 days after service by the Region, post at its Orange, New Jersey facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 25, 2005.

d. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 15, 2006

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David I. Goldman
Administrative Law Judge

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

JD-70-06
Orange, NJ

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT tell employees that they cannot participate in the club dish program because they chose union representation.

WE WILL NOT tell employees that they will not be receiving overtime assignments because they chose union representation.

WE WILL NOT refuse to implement the club dish program because employees chose union representation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL implement the club dish program at the Orange, New Jersey facility unless we can prove that we have ended the program at our other facilities for reasons unrelated to the violations found in this case.

WE WILL make you whole for any loss of earnings and other benefits resulting from our unlawful failure to implement the club dish program at the Orange, New Jersey facility on September 1, 2005.

DISH NETWORK SERVICES, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor

Newark, New Jersey 07102-3110

Hours: 8:30 a.m. to 5 p.m.

973-645-2100.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.